

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
(302) 255-0664

Jarid L. Cubbage

**Delaware Correctional Center
1181 Paddock Road
Smyrna, Delaware 19977
Plaintiff Below/Appellant.**

**Eileen Kelly, Esquire
Deputy Attorney General
Department of Justice
Carvel State Office Building
820 North French Street
Wilmington, Delaware 19801
Attorney for Defendants Below/Appellees**

**Re: Jarid L. Cubbage v. Warden Thomas Carroll and Sergeant
Larry Connelly
C.A. No. 05A-09-007 RRC**

Submitted: January 11, 2006

Decided: February 17, 2006

On Appellees' Motion to Dismiss Appeal.
GRANTED.

Dear Mr. Cubbage and Ms. Kelly:

Currently before the Court is Appellees Warden Thomas Carroll and Sergeant Larry Connelly's ("Appellees") Motion to Dismiss Appeal. This motion arises from an appeal of a decision by the Court of Common Pleas of New Castle County in which that court denied Jarid L. Cubbage's ("Appellant") Motion for Reargument of a Motion to Vacate a prior decision of that court. That prior decision had dismissed Appellant's appeal from a Justice of the Peace decision denying Appellant's replevin action in that court.

I. FACTS AND PROCEDURAL HISTORY

This case originated when Appellant brought a pro se replevin action in Justice of the Peace Court No. 9 alleging that certain items were

unlawfully confiscated from his prison detention cell. On February 15, 2005, after a trial, that court ruled in favor of Appellees.

On March 9, 2005, Appellant appealed that decision from the Justice of the Peace Court to the Court of Common Pleas. However, in doing so, Appellant did not comply with the filing requirements of Court of Common Pleas Civil Rule 72.3. Specifically, Appellant failed to properly file a Complaint¹ or the transcript of the February 15 proceeding within the time prescribed.² As a result, on April 22, 2005, the Court of Common Pleas dismissed Appellant's appeal from the Justice of the Peace Court.

Subsequently, on May 6, 2005, Appellant, pursuant to Court of Common Pleas Civil Rule 60(b), filed a Motion to Vacate that Court's April 22 dismissal of Appellant's appeal from the Justice of the Peace Court. While Appellant did not address his failure to file the Complaint and the praecipe, Appellant argued that because of his incarceration and the paucity of funds in his inmate account, he was unable to finance the procurement of the transcript of the February 15 trial in the Justice of the Peace Court. However, that argument was unavailing as the Court of Common Pleas on May 25, 2005, denied Appellant's Motion to Vacate. The court used the excusable neglect standard of Rule 60(b), or "neglect which is the act of a reasonably prudent person under the circumstances[.]" in ruling that "[w]hile failure to file the transcript due to lack of resources is excusable, the failure to file the complaint with the appeal is quite different."³ The court concluded that "[t]he rule is clear that the complaint is to be filed with appeal when the Appellant has the duty to file the first pleading ... [and] failure to file the complaint and praecipe without explanation [is not] excusable..."⁴

Thereafter, on June 6, 2005, Appellant filed another motion for relief pursuant to Court of Common Pleas Civil Rule 60(b) asking that the May

¹ CCP Civ. R. 72.3(a) provides, in pertinent part: "[W]hen the appellant is the party having the duty of filing the complaint or other first pleading on appeal, the appellant shall file such pleading with the notice of appeal and a praecipe."

² CCP Civ. R. 72.3(b) provides, in pertinent part: "The appellant shall file a certified copy of the record of the proceedings below, not including the evidence, within 10 days of the filing of the notice of appeal."

³ *Cubbage v. Carroll*, Del. CCP, C.A. No. 05-03-142, Smalls, C.J. (May 25, 2005), at 2.

⁴ *Id.*

25, 2005, decision from that court be reargued. On June 15, 2005, a memorandum from the Court of Common Pleas notified Appellant that his June 6 motion had been denied by Chief Judge Smalls.

Appellant then attempted to appeal the June 15, 2005, decision to the Superior Court.⁵ On July 8, 2005, Appellant filed an “Appeal from Court of Common Pleas Praeipie” in this Court. That praecipe was “clocked in,” or temporarily accepted, by the Prothonotary of the Superior Court but was rejected and voided because it was incorrectly filed. There is no evidence that the State was sent a copy of this document by Appellant. In a “Notice of Non-Conforming Documents” sent to Appellant on July 13, 2005, the Prothonotary notified Appellant and set forth the reasons for the rejection, and enclosed with the notice a packet of the documents required to file a conforming appeal.⁶ On three more subsequent occasions, the Prothonotary sent a “Notice of Non-Conforming Documents” to Appellant, apparently after Appellant attempted to file another appeal. On August 5, 2005, the Prothonotary sent a notice to Appellant that it had rejected Appellant’s appeal because the required check in the amount of \$175.00 was not included.⁷ On August 18, 2005, the Prothonotary repeated the procedure because the Case Information Statement form did not contain Appellant’s name or address nor did the praecipe did not have the Attorney General’s address on it. Finally, on September 1, 2005, the Prothonotary notified

⁵ Although it is not clear from which decision Appellant appeals, either the May 25 decision or the June 15 decision, it is presumed that the operative decision for this appeal is the June 15 decision, as that is the later of the two decisions. However, regardless of which is the judgment appealed from, Appellant’s appeal to this Court was not timely filed and perfected within the required 30-day period after either of those decisions.

⁶ Super. Ct. Civ. R. 72(c) provides, in relevant part:

“The notice of appeal shall specify the parties taking the appeal, shall designate the order, award, determination or decree, or part thereof appealed from; shall state the grounds of the appeal; shall name the Court to which the appeal is taken; and shall be signed by the attorney for the appellants.”

As such, the Prothonotary included in the packet of materials sent to Appellant detailed instructions on filing an appeal, a case information statement, a praecipe, a citation on appeal writ (with instructions on how to complete), and a notice of appeal (with instructions on how to complete). As Appellant’s filing on July 8, 2005, consisted of only the praecipe, the Prothonotary rightfully rejected it.

⁷ Appellant later filed an application to proceed in forma pauperis, which was granted by this Court on September 30, 2005. It appears that no such application had until that time been filed by Appellant.

Appellant that the documents, of which two copies are required, needed to have his original signature.

The instant appeal was finally properly filed on September 16, 2005 asserting that the Court of Common Pleas abused its discretion when that court denied Appellant's Motion to Vacate.⁸ Appellees bring the instant Motion to Dismiss Appeal.

II. CONTENTIONS OF THE PARTIES

In support of their Motion to Dismiss Appeal, Appellees argue that Appellant did not file his appeal until September 16, 2005, almost four months after the Court of Common Pleas issued its order on May 25, 2006, denying Appellant's Motion to Vacate.⁹ Appellees assert that "because the appeal was not filed within the mandated time period of 30 days, this Court cannot exercise jurisdiction and the appeal must be dismissed."¹⁰

As to his failure to file an appeal within the required period, Appellant responds that when by virtue of his filing of the "Appeal from Court of Common Pleas Praecipe" on July 8, 2005, he "timely filed the initial notice of appeal within the 30 day statutory period."¹¹ Appellant further contends that "[a]lthough it took three or four months to perfect his notice of appeal, the [Appellant] made earlier attempts to correct the mistakes in the notice of appeal. The attempts were not valid, but it's clear that the [Appellant] tried to correct the errors."¹² Appellant argues that his failure to file a valid appeal within the required 30-day period after the judgment should not preclude him from being able to "cure the defective filing" and proceed with litigation.¹³ Appellant finally asserts that the filing of the appeal well after

⁸ Although Appellant, in his appeal, also raises claims that the Justice of the Peace Court erred in dismissing his case and that his property was improperly confiscated, the Court declines to reach those issues as they are not properly before this Court on appeal.

⁹ Although Appellees argue that Appellant appeals from the May 25, 2005, order, this Court finds that the operative order is the Court of Common Pleas' June 15, 2005, order.

¹⁰ Appellee's Mot. ¶ 8.

¹¹ Appellant's Opp. ¶ 7.

¹² *Id.*

¹³ *Id.* at ¶ 8.

the required period did not “burden the [Appellees’] ability to adequately protect their interests.”¹⁴

In reply, Appellees argue that although the Appellant “claims that he made attempts to correct the mistakes in his Notice of Appeal ... he does not provide any evidence in support of this claim...”¹⁵ Finally, as to Appellant’s argument that he be allowed to amend his appeal, Appellee’s urge that because “the appeal was not docketed at all within the permissible time period ... there can be no issue of [Appellant] moving to amend his Notice of Appeal.”¹⁶

III. DISCUSSION

The issue here is whether Appellant’s appeal from the Court of Common Pleas decision of June 15, 2005, denying Appellant’s Motion for Re-argument of that court’s May 25, 2006, order, was timely filed. It is clear that it was not.

Pursuant to 10 *Del. C.* § 1326, a litigant in the Court of Common Pleas has the right to appeal from any final order, ruling, decision or judgment in that court to the Superior Court in the county in which the order was rendered.¹⁷ “The appeal shall be taken within 30 days of the final order, ruling, decision or judgment.”¹⁸ Finally, that appeal shall be reviewed on the record.¹⁹

Under Delaware law, “if a party fails to perfect an appeal within the statutorily mandated period, a jurisdictional defect results, thereby preventing the appellate court from exercising jurisdiction.”²⁰ Moreover, “[t]he filing of a notice of appeal within the prescribed period ... confers

¹⁴ *Id.*

¹⁵ Appellees’ Reply ¶ 4.

¹⁶ *Id.* at ¶ 6.

¹⁷ 10 *Del. C.* § 1326(a).

¹⁸ 10 *Del. C.* § 1326(b).

¹⁹ 10 *Del. C.* § 1326(c).

²⁰ *Preston v. Bd. of Adjustment of New Castle County*, 772 A.2d 787, 791 (Del. 2001) (holding that where the proper pleadings were filed within the statutorily mandated period and complied with the applicable statute, the Superior Court’s jurisdiction was properly invoked) (citations omitted).

jurisdiction on the appellate court, which will not dismiss the appeal for a defect that does not result in substantial prejudice to a party in interest.”²¹

Here, although Appellant attempted to file a praecipe within 30 days of the Court of Common Pleas’ order, that praecipe was correctly rejected and voided as improperly filed. The Prothonotary properly rejected all of Appellant’s filings prior to September 16, 2005, under Superior Court Civil Rule 72 as well as under the Prothonotary’s established procedure. Appellant’s appeal was not properly filed under the rules until September 16, 2005, almost four months after the May 25, 2005 decision was rendered by the Court of Common Pleas. Thus, neither Appellant’s invalid filing on July 8 nor Appellant’s untimely filing on September 16 are sufficient to invoke this Court’s appellate jurisdiction. Further, there is no support in the record to allow Appellant to amend his notice of appeal.

As to the ability of a noncompliant notice of appeal to invoke an appellate court with jurisdiction, the Delaware Supreme Court recently stated:

[T]he proper purpose of a notice of appeal filed in the Delaware Supreme Court is to provide notice of the appeal to all litigants who may be directly affected thereby, and to afford them an opportunity to take action to adequately protect their interests. We conclude that this standard should be applied uniformly to every Delaware court when functioning in an appellate capacity.²²

Here, however, the record does not indicate that Appellees ever had “notice” of Appellant’s failed attempt to file his appeal on July 8. Thus, Appellees had no “opportunity to take action to adequately protect their interests” because they had no notice of Appellant’s attempted July 8, 2006, appeal. Moreover, another Delaware Supreme Court decision has emphasized the need for strict limitations periods for perfecting appeals: “It is fundamental that the appellate jurisdiction of this Court rests upon the perfecting of an appeal within

²¹ *Id.* (citations omitted).

²² *Silvious v. Conley*, 775 A.2d 1041, 1042 (Del. Supr. 2001) (holding that a notice of appeal that fails to set forth the grounds for the appeal and is “woefully inept” may nevertheless invoke a court’s appellate jurisdiction where it “serves the essential purpose of providing notice to the opposing parties so they could take action to adequately protect their interests”) (citations omitted).

the period of limitations fixed by law.”²³ In *Riggs*, the Court stated that “all statutes of limitation and all statutory appeal requirements are, by their very nature, ‘harsh’ in that they arbitrarily establish jurisdictional prerequisites for initiating or maintaining a suit.”²⁴

Thus, because Appellant’s notice of appeal was not filed within 30 days of the Court of Common Pleas’ June 15, 2005, denial of Appellant’s Motion for Reargument of that court’s May 25, 2005, order, Appellant cannot properly invoke the appellate jurisdiction of the Superior Court.

IV. CONCLUSION

In light of the foregoing, Appellees’ Motion to Dismiss Appeal is **GRANTED**. Accordingly, the oral argument scheduled for February 27, 2006, at 8:45 a.m., is cancelled.

IT IS SO ORDERED.

Very truly yours,

oc: Prothonotary

²³ *Riggs v. Riggs*, 539 A.2d 163, 163 (Del. Supr. 1988), *rearg. granted on other grounds* (denying a motion to extend time period to file notice of appeal).

²⁴ *Id.* at 164.